STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Owens, P.J., and Gleicher and Stephens, JJ.

MICHIGAN COALITION OF STATE EMPLOYEE UNIONS; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA and its LOCAL 6000; MICHIGAN CORRECTIONS ORGANIZATION/SEIU MICHIGAN PUBLIC EMPLOYEES/ SEIU LOCAL 517M; MICHIGAN STATE EMPLOYEES ASSOCIATION, AFSCME, LOCAL 5; MICHIGAN AFSCME COUNCIL 25; and ANTHONY MCNEILL, RAY HOLMAN, ANDREW POTTER, ED CLEMENTS, AMY LIPSET, WILLIAM RUHF, KENNETH MOORE, RUSSELL WATERS, MARK MOZDZEN and KATHLEEN WINE, on behalf of themselves and a similarly situated class,

Plaintiffs-Appellees,

v

STATE OF MICHIGAN; MICHIGAN STATE EMPLOYEES RETIREMENT SYSTEM; MICHIGAN STATE EMPLOYEES RETIREMENT SYSTEM BOARD; MICHIGAN DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET; JOHN NIXON, AS THE DIRECTOR OF THE MICHIGAN DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET; PHIL STODDARD, AS THE DIRECTOR OF THE OFFICE OF RETIREMENT SERVICES OF THE MICHIGAN DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET; AND ANDY DILLON, AS THE TREASURER OF THE STATE OF MICHIGAN,

Defendants-Appellants,

/

Supreme Court No. 147758

Court of Appeals No. 314048

Ingham Circuit Court No. 12-17-MM

RESPONSE BRIEF OF DEFENDANTS-APPELLANTS TO THE AMICUS CURIAE BRIEF OF THE MICHIGAN CIVIL SERVICE COMMISSION

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

RESPONSE BRIEF OF DEFENDANTS-APPELLANTS TO THE AMICUS CURIAE BRIEF OF THE MICHIGAN CIVIL SERVICE COMMISSION

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INTRODUCTION

There is no question that the Constitution gives the Michigan Civil Service Commission the authority to "fix rates of compensation" and to "regulate the terms and conditions" of State employment. But it is equally clear that the ratifiers of article 6, § 22 of the 1908 Constitution and article 11, § 5 of the 1963 Constitution, respectively, neither intended to preclude the Legislature from establishing a pension plan for former State employees, nor did they intend to exclusively empower the Commission to do the same.

This conclusion is confirmed not only by the plain language of these provisions, which expressly distinguish between compensation and pensions, but also by the fact that, just three years after the adoption of article 6, § 22, the Legislature – not the Commission – established a pension plan for State employees through the enactment of 1943 PA 240. And in the seven decades since its creation, no Michigan court has ever seriously questioned the provenance or legitimacy of the legislatively enacted pension plan. To the contrary, Michigan courts have repeatedly and consistently acknowledged that PA 240 was – and still remains – a creature of the Legislature.

Furthermore, the Commission's claim that that it possesses "plenary power" over the legislatively enacted pension plan is belied by the fact that it waited more than 70 years to assert this purported authority. More fundamentally, if the Commission were correct, then the Legislature could not have enacted the pension plan in the first place and the scores of legislatively enacted amendments thereto would be unconstitutional and, thus, invalid.

CLARIFICATION OF FACTS

The Commission makes a number of factual allegations inconsistent with history and the record. The most significant discrepancies are highlighted here.

First, although the Commission was indeed conceived for the purpose of eliminating the "spoils system" (Brief for the Michigan Civil Service Commission as Amicus Curiae (Br), pp 3–4), the 1936 Civil Service Study Commission report makes clear that one of the primary shortcomings that required redress was the "absence of classification and orderly fixing of *salaries*[.]" (Exhibit 1,[1] p 33.) Accordingly, the report's authors drafted a bill, which was enacted by the Legislature in 1937, that provided for the Commission to adopt "minimum and maximum *salary rates*" for "each class of position in the classified service" and further prohibited the payment of a "*salary* that is greater than the maximum or less than the minimum rates fixed in the approved compensation plan[.]" (Exhibit 1, pp 66–67) (emphasis added); see also 1937 PA 346. This is significant because it confirms that fixing compensation was understood to refer to fixing salaries.

Second, the adoption of article 6, § 22 merely evinces the intent of the people to create a constitutional civil service system – one that retained the authority theretofore conferred by statute – to "classify all positions in the state civil service" and "fix rates of compensation for all classes of positions." Moreover, the plain language of article 6, § 22 does not evince the intent to vest in the Commission sole and exclusive authority over state-employee pensions. Furthermore, none of the

[1] Refers to the exhibits attached to the Commission's Brief in Opposition to Appellants' Application for Leave to Appeal.

referenced Attorney General opinions interpreting the Commission's authority under article 6, § 22 purport to recognize that pensions are either a "rate of compensation" or a "condition of employment." (Br, pp 6–8.)

Third, the Commission's lengthy rendition of the history surrounding the adoption of article 6, § 22 (Br, pp 5–8) glosses over the fact the Constitution expressly provides for the Legislature to adopt laws for the general welfare of the people of the state and to enact laws concerning the hours and conditions of employment. Const, 1963 art 4, §§ 49 & 51. Accordingly, the Legislature has adopted laws providing, *inter alia*, for pension plans, retire health care, and disability compensation for state employees.

Fourth, as the Commission points out (Br, p 7), it had the authority to adopt rules that had the force of law. But it did not adopt rules establishing a pension plan; instead, it recommended that the Legislature do so, perhaps because it recognized that only the Legislature had the authority to do so.

Fifth, the Commission asserts that the ratifiers of article 11, § 5 of the 1963 Constitution intended that the Commission retain its "broad, exclusive powers." (Br, p 8.) But none of the Attorney General opinions cited by the Commission purport to suggest either that pensions provided under PA 240 are subject to the Commission's exclusive control, or that the Legislature is precluded from amending PA 240. (Br, pp 9–10.) Further, the Commission fails to note that the Attorney General has expressly recognized that PA 240 is a creature of the Legislature and

can only be amended or repealed thereby. See e.g., OAG 1971–1972, No 4732; OAG Letter to State Personnel Director, Sydney Singer (January 11, 1974).

Moreover, the official comments to article 11, § 5 from the Constitutional Convention are tellingly devoid of any discussion of pensions. Instead, the comments make clear that the ratifiers viewed the Commission's authority in regard to "compensation" as encompassing the establishment of minimum and maximum salary scales for each position that it classifies. 1 Official Record, Constitutional Convention 1961, p 639–641; 2 Official Record, Constitutional Convention 1961, p 3405. This history further confirms the commonly understood meaning of "compensation."

Sixth, contrary to the Commission's assertion, it has not played a prominent role in regard to "retirement benefits" provided under PA 240. (Br, pp 17–20.) To the extent the Commission has had anything to do with state-employee pensions, its role can generously be described as complementary to that of the Legislature, which is a far cry from the "exclusive" authority that the Commission claims to possess. This conclusion is reinforced by the fact that the Commission merely proposed a pension plan for adoption by the Legislature and did not purport to retain any final say in its enactment or subsequent administration. Furthermore, the Commission's claim that it possesses exclusive control over state-employee pensions rings hollow in light of its own rules, which merely pledge the Commission's "*cooperation*" with the Legislature in retirement matters (Civil Service Rules, § 31 (1963); Exhibit 18) (emphasis added). It is further belied by the fact that the Legislature has enacted

scores of amendments to PA 240 without the Commission's approval, including the creation of a *new retirement plan* in 1997. See 1996 PA 487.

Finally, the Commission asserts that the Legislature is prohibited from making any unilateral change to the nature of retirement benefits. (Br, p 21.) In support of this assertion the Commission points only to *AFSCME Council 25*, 294 Mich App 1; 818 NW2d 337 (2011), which held unconstitutional an attempt by the Legislature to eliminate a Commission-approved pay increase by imposing a mandatory health care contribution of like amount. That case does not, however, recognize that pensions provided under PA 240 are subject to the Commission's exclusive control. Instead, it merely reinforces the well-established principle that the Legislature cannot interfere with the pay rates that have been "fixed" by the Commission.

ARGUMENT

I. PA 264 is constitutional.

The Commission asserts that article 11, § 5 vests in it the exclusive authority to regulate employment-related activity subject only to the Legislature's narrow authority to veto proposed increases in compensation. The Commission goes on to allege that, here, the Legislature has attempted to intrude in the Commission's exclusive sphere of authority "by enacting Act 264 and impermissibly reducing and changing the nature of compensation and conditions of employment." (Br, 22–23.) This reasoning begs the question. Neither the plain language nor circumstances surrounding the adoption of article 11, § 5 support the Commission's position.

A. Pensions are not a "rate of compensation" within the meaning of article 11, § 5.

The Commission's primary argument – that pensions are "compensation" within the Commission's exclusive control – rests upon an erroneous premise: the fiction that pensions provided under PA 240 are part of the "compensation package" that was "established by the Commission." (Br, 28.) On the contrary, PA 240 was established by the Legislature and can only be amended thereby.

1. PA 264 does not intrude on the Commission's authority to "fix rates of compensation."

Relying on a series of inapposite cases and Attorney General opinions, the Commission insists that the term "compensation" must be construed broadly to include "pensions." But article 11, § 5 itself shows that compensation and pensions are distinct: the 1978 amendment to article 11, § 5 listed them as different items when it gave state police troopers and sergeants the ability to bargain over "compensation," "retirement," and "pensions." While the Commission asserts that a 1978 amendment could not alter the meaning of the word "compensation" in the 1963 Constitution (Br, 33), that assertion rests on the Commission's completely unsupported (and incorrect) assumption that "compensation" in 1963 was commonly understood to include pensions. But that was not the common understanding, which is precisely why in 1978 it was necessary to specifically list pensions separately—the common meaning of "compensation" still did not include retirement or pensions. In other words, if the ratifiers of article 11, § 5 in 1963 intended that "compensation" included "retirement" and "pensions," then they would not have

needed to add "retirement" and "pensions" in the 1978 amendment. Put simply, the term "compensation" in article 6, § 22 and article 11, § 5 was intended by ratifiers (in both 1963 and 1978) to include wages and salaries, not retirement or pensions. As a result, the ratifiers of article 11, § 5 did not intend to restrict the Legislature's inherent authority to adopt and amend pension plans.

In any event, none of the Commission's cited authorities support the position that the Commission's authority to "fix rates of compensation" includes pensions provided under PA 240. To the contrary, the Attorney General has made clear that "the power of the Civil Service Commission to fix rates of compensation and fix increases in rates of compensation is not a general grant of authority to adopt retirement systems" and that pensions provided under PA 240 are "fixed by the Legislature." OAG Letter to State Personnel Director, Sydney Singer (January 11, 1974.) (App 71b); OAG 1971–1972, No 4732 (December 29, 1971).

The Commission argues that the decision in *Oakley v Department of Mental Health*, 136 Mich App 58; 355 NW2d 650 (1984), is not relevant because, there, the Legislature passed a law giving certain classified employees *more* compensation than was approved by the Commission. (Br, 28.) But if the Commission has sole authority over compensation then any legislative action affecting the same – whether to increase or decrease – would be unconstitutional. In fact, *Oakley* supports the principle that the Legislature has the authority under article 4, § 51 to pass laws that provide for monetary benefits to civil service employees as long as those payments do not reduce the compensation that has been "fixed" by the

Commission. *Id.* at 60–64. Here, PA 264 does not reduce any "rates of compensation" that have been "fixed" by the Commission. Instead, PA 264 merely conditions membership in the legislatively enacted pension plan on the payment of attendant contributions.

The Commission even acknowledges that it has abstained from developing its own comprehensive retirement plan for civil servants. (Br, 35.) Nevertheless, the Commission essentially insists that any monetary payment or benefit provided to state employees, including pensions provided under PA 240, are subject to the Commission's control. But that argument is contrary to *Oakley*, which held that the Legislature has the authority to adopt a disability *compensation* plan for state employees. 136 Mich App at 63–64. Accordingly, the Commission's suggestion that the Legislature is prohibited from enacting (or amending) laws that provide financial benefits by virtue of one's status as a state employee is without merit.

The Commission also argues that PA 264 is unconstitutional because it infringes upon the Commission's exclusive authority to make decisions affecting state employees' take-home pay. (Br, 24–27.) In support of this claim, the Commission relies primarily upon *Crider v State*, 110 Mich App 702; 313 NW2d 367 (1981), and *AFSCME Council 25 v State Employees' Retirement System*, 294 Mich App 1; 818 NW2d 337 (2011). But neither case supports that inference. *Crider* held that the Commission's authority to regulate *conditions of employment* included the authority to order layoffs. *AFSCME Council 25* held that the Legislature is prohibited from reducing Commission-approved pay rates by imposing mandatory

payroll deductions. But PA 264 does not, in any event, *force* any reduction of state employees' take-home pay. As a result, the Commission's inference that PA 264 effectively reduces employees' "compensation" under article 11, § 5 is factually and legally incorrect.

2. Article 11, § 5 does not prohibit the Legislature from enacting a pension plan for state employees or from amending that plan.

The Commission also urges this Court to adopt a narrow reading of article 4, § 51, which authorizes the Legislature to adopt laws "for the protection and promotion of the public health." (Br, pp 31–32.) The Commission asserts that pension plan amendments at issue here do not rise to the level of a "public purpose." But the Commission's argument ignores the fact that the pension plan provided under PA 240 – like the supplemental disability compensation plan at issue in *Oakley*, and the MIOSHA statute at issue in *Department of Transportation v Brown*, 153 Mich App 773; 396 NW2d 529 (1986) – was enacted to provide for the general welfare of the people of the state. It follows that the Legislature retains the ability to modify the details of its retirement plan without having to justify how each amendment promotes the public health.[2]

B. Pensions provided under PA 240 are not a "condition of employment" within the meaning of article 11, § 5.

[2] Nevertheless, the challenged provisions at issue may properly be viewed as promoting the public health by securing the financial viability of the pension plan for current and prospective retirees.

The Commission asserts that "it cannot be reasonably disputed that details of retiree benefits is an internal matter related to employment in the civil service." (Br, p 37.) But the Commission does not – and cannot – point to a single case that supports the proposition that the pension plan provided by the Legislature through PA 240 is a "condition of employment." Instead, the Commission invokes *Detroit Police Officers Association v City of Detroit*, 391 Mich 44; 214 NW2d 803 (1974), and *Mount Clements Fire Fighters Union, Local 838, IAFF v City of Mount Clemens*, 58 Mich App 635; 228 NW2d 500 (1975), both of which concern mandatory subjects of collective bargaining under the Public Employment Relations Act. But the Commission's reliance on those decisions is misplaced because neither purports to address whether the pensions at issue here are a "condition of employment" within the meaning of article 11, § 5.

1. PA 264 does not interfere with the Commission's authority to "regulate conditions of employment."

The challenged provisions at issue – §§ 1e, 35a and 50a – do not impose any "condition of employment." To the contrary, § 50a gives eligible state employees the option of participating in the defined benefit pension plan. Only those employees who elect to remain in the pension plan are required to make the contribution provided by § 35a. Further, § 1e neither imposes any condition relative to the performance of overtime, nor does it conflict with any Commission rule regarding the same. Rather, it merely modifies the manner in which *future* overtime pay is factored into an employee's pension calculation.

In short, providing employees with a choice of retirement plans does not impose any new – or alter any existing – "condition of employment" that is subject to the exclusive regulation of the Commission. And contrary to the Commission's suggestion (Br, 26), state employees do not have a right to the continuation of laws as they existed prior to the enactment of PA 264. This Court has long recognized that "[t]here can, in the nature of things, be no vested right in an existing law which precludes its change or repeal." *Harsha v City of Detroit*, 261 Mich 586, 594; 246 NW 849 (1933) (internal citations omitted).

2. Even if pensions were a "condition of employment" (which they are not), the Legislature possesses the constitutional authority to enact and amend PA 240.

Regardless of whether the terms and conditions of the legislatively enacted state-employee pension plan amount to a "condition of employment," the Commission's authority to regulate state employment does not preclude the Legislature from enacting laws that apply to state employees. To the contrary, article 4, § 49 expressly provides for the Legislature to "enact laws relative to . . . conditions of employment." Const 1963, art 4, § 49; *UAW v Green*, 302 Mich App 246; 839 NW2d 1 (2013).

Simply put, the Legislature exclusively controls pensions provided under PA 240 and its authority in that regard is constrained only by the narrow limitations specifically set forth in the Constitution. Because PA 264 does not interfere with any "rates of compensation" that have been fixed by the Commission, or otherwise

interfere with the Commission's authority to regulate "conditions of employment," it should be deemed constitutional.

RELIEF REQUESTED

The State respectfully requests that the Court reverse the Court of Appeals and affirm the constitutionality of §§ 1e, 35a, and 50a of 2011 PA 264.

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